No. 2687

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

INMAN-POULSEN LUMBER CO.,
a corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiff in Error.

Cake & Cake, of Portland, Oregon, Attorneys for Defendant in Error.

GLASS & PRUDHOMME CO., PORTLAND, OREGON

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UNITED STATES OF AMERICA,
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vs.

INMAN-POULSEN LUMBER CO.,
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STATEMENT OF FACTS.

This is an action brought by the United States to recover damages for the value of timber cut from a certain quarter section of land situated in the State of Washington, particularly described as the SE¼ section 21, Township 4 N. R. 2 E. W. M. The timber is alleged to have been unlawfully cut by one William N. Stanley, and by him sold to the defendant, Inman-Poulsen Lumber Company.

The defendant demurred to the plaintiff's complaint on the ground that it did not state a cause of action. The court below sustained the demurrer, the opinion on which the decision is based being set forth in the record here. The plaintiff thereafter filed a second amended complaint, alleging certain additional facts, the absence of which was commented upon in the court's said opinion, and the defendant again demurred on the same ground as before. The court also sustained this demur-

rer and in its opinion referred largely to the grounds of decision given in sustaining the demurrer to the original complaint. For this reason appellant has set forth in the record herein both of the opinions given by the court and the proceedings upon which same were based.

The plaintiff electing to stand upon his second amended complaint, the court gave judgment for the defendant.

This appellant has assigned as error the action of the court in holding that the second amended complaint does not state a cause of action, and in sustaining defendant's demurrer to the said complaint.

The second amended complaint alleges in substance that the Northern Pacific Railroad Company, by virtue of the Act of Congress of July 2, 1864 (13 Stat. L., 365, 367), was granted certain public lands to aid in construction of its road and that by reason of the subsequent location of the road became vested of a certain quarter section of land particularly described in the complaint, and which is the land from which the timber was cut. This quarter section was patented to the railroad company on May 24, 1895. On July 1, 1898, there was approved an Act of Congress (30 Stat. L., 597, 620) in which provision was made that certain lands within the said grant to the Northern Pacific Railroad Company which had been disposed of by the United States or was occupied and claimed as provided in the said act prior to January 1, 1898, might be relinquished by the said Railroad Company to the United States and other lands taken in lieu thereof. In accordance with

the terms of the said act of 1898, the Railroad Company did relinquish to the United States the quarter section of land described in the complaint. The said land was first listed for relinquishment on May 2, 1905, by the Secretary of the Interior. The Railroad Company gave a quitclaim deed to the United States for the said land on August 5, 1907, and on January 3, 1908, the deed was accepted by the United States. The complaint also alleges that at all times mentioned therein the said quarter section of land was public land of the United States.

The said complaint further alleges that on January 28, 1908, the homestead application of one William N. Stanley was allowed by the General Land Office for the said quarter section of land by virtue of his claim of settlement on said land as an actual bona fide settler prior to January 1, 1898, to-wit, that he was such bona fide settler since the year 1891; that in further support of his said homestead application Stanley submitted proof to the land office that he had made a homestead application for the said land on or about December 30, 1896, in which said application he alleged settlement and residence on the land since the year 1891. On April 6, ~~1898~~ 1906, Stanley relinquished the homestead entry to the United States. During the time that the said Stanley claimed to occupy the land as an actual bona fide settler, to-wit, during the years 1900, 1901, 1902 and 1903, the said Stanley, together with others, wrongfully and unlawfully cut and removed from his said homestead and settlement claim large quantities of timber for sale and speculation, and not in the course of clearing and improving the land; that the land from which the timber

was so cut and removed had never been cleared, cultivated or improved, and was not intended to be cleared, cultivated or improved by the said Stanley. At various times during the years 1901, 1902 and 1903 the said Stanley and others removed the timber cut by them from the land, placed it in the Lewis River in rafts and sold the timber in the rafts to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said company; that the timber cut, removed and sold by Stanley and others was so disposed of without the knowledge, consent or permission of either the Northern Pacific Railroad Company, its assigns, or the United States. Plaintiff alleges damages in the sum of $5500, and demand for payment before the commencement of the suit, and refusal by the defendant company.

ARGUMENT.

NATURE OF ACTION.

The complaint is substantially an action in trover for the recovery of the value of the timber wrongfully and unlawfully taken from property owned by the appellant.

To sustain this action plaintiff's complaint must show either that plaintiff had the title to the land described in the complaint from which the timber was cut, at the time the same was cut and removed from the land, or that the plaintiff had possession or the right of immediate possession of the said land or the timber thereon at the time the timber was cut and removed.

38 Cyc., 2044 to 2050.

It is well settled that a purchaser of timber from a trespasser, who wrongfully cut the timber from the lands of another, is liable to the true owner for the timber or its value, as well as the trespasser, even though he purchased the timber in good faith.

Woodenware Co. v. U. S., 106 U. S. 432.

PRINCIPAL QUESTION INVOLVED.

As the appellant views this case, the sufficiency of the complaint depends upon whether the act of July 1, 1898 (supra), gave the United States such title, possession or right of possession to the land at the time that the timber was cut therefrom as to enable to it to maintain an action in trover for the timber cut.

The court below held that the Northern Pacific Railroad Company, having title to the land at the time of cutting of the timber, the United States could not maintain this action, and that the provisions of the Act of July 1, 1898, with reference to the relinquishment of certain granted lands by the Railroad Company and their reversion to the United States, had reference only to the title after relinquishment, and did not vest the Government with title to the lands or the timber growing thereon or the right of possession thereof prior to the relinquishing of the land by the Railroad Company, and did not assign any right of action the Railroad Company may have had for the timber.

THE PURPOSE AND SCOPE OF THE ACT OF JULY 1, 1898.

This Act was enacted to settle disputes which had existed prior thereto between the Northern Pacific Railroad Company, and occupants and purchasers under the United States land laws, both claiming under the United States. In so far as the Act refers to the questions under discussion we quote from the same as follows:

> That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd numbered section, in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Terri-

tory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: Provided, however, that *the Secretary of the Interior shall from time to time ascertain* and, as soon as conveniently may be done, *cause to be prepared and delivered to the said railroad grantee or its succcssor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid,* and *are now claimed by said purchasers or occupants,* their heirs or assigns, according to the smallest Government subdivisions. *And all right, title and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee,* and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said

> grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor; Provided, further, that the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal.

The meaning and scope of the Act of July 1, 1898, is discussed at length in the case of Humbird v. Avery, 195 U. S., 480, 499, where the court, speaking through Mr. Justice Harlan, says:

> "Obviously, the first inquiry should be as to the object and scope of the Act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it be-

> came the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the Act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants."

The Supreme Court in this case held that the Act applied to lands which had been patented to the Railroad Company prior to the Act of 1898, as well as to unpatented lands claimed by the Railroad Company, and that the vested rights of the Railroad by reason of the patent to said lands was not such as would enable it to alienate or in any way dispose of its right, title and interest to the same before the Secretary of the Interior had filed his listing of selections made as provided in the Act; that the list of selections made under the Act by the Secretary were absolutely binding upon the Railroad Company and the lands so listed must be surrendered by it upon such listing. The court further said that the Railroad Company promptly accepted the Act of 1898, and is therefore absolutely bound by its provisions. (In the statement of the case at page 488 the date of acceptance is given as July 13, 1898.)

See also Hutchison v. N. P. Ry. Co., 43 L. D. 563.

Assistant Secretary Pierce of the Interior Department in the case of Northern Pacific Railroad Company v. Huston, 36 L. D. 283, in commenting upon the purpose of the Act, states:

> "Congress intended an adjustment of conflicting claims. Adjustment implies an equitable settlement and precludes the idea of unfair dealing or the taking of undue advantage by either of the parties thereto. When the object of the statute is plain every rule of construction requires that it be so interpreted and administered as to carry out such object, if this can be accomplished without doing violence to the language used."

Thus it appears that the purpose of the Act was to adjust matters as they stood at the time of its passage. After its passage and its acceptance by the Railroad Company, the Company put it out of its power to successfully assert a superior right to the land in dispute against an individual claimant, whatever it might have done prior to that time. In the said case of the Northern Pacific Railroad Company v. Huston, supra, Secretary further holds:

> "The individual claimant by the terms of the Act became entitled to retain or relinquish his disputed claim. The first step in the plan of adjustment must be taken by him. The act placed

in his hands the right of election and the exercise of that right the railway company could not defeat. The railway company having voluntarily lodged this power in the individual applicant, it can hardly be said that it was thereafter asserting a superior right to the land. Its right was wholly dependent upon the election of the individual claimant. Congress certainly never intended that the right of the railway company should be further impaired by permitting the individual claimant to defer his election until he had destroyed the value of the land and then relinquish a barren claim."

In the case of Humbird v. Avery, supra, the court at page 506 states:

> "We agree with the Circuit Court that the Act gives the option to keep or relinquish the disputed land to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the Secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by the acceptance of the act."

STANLEY AT THE TIME OF THE CONVERSION OF THE TIMBER ELECTED TO RETAIN THE LAND.

It follows from this statement that if the claimant Stanley had determined what course he would pursue there was a mere ministerial duty devolving upon the

Secretary of the Interior, to-wit, the duty of listing the land for relinquishment by the Railroad Company. The Company on the other hand had only to quitclaim the land listed, for by the acceptance of the Act it had agreed to transfer to the United States whatever lands were contained in the list. We contend that this selection on the part of the claimant, who in this case was Stanley, was made at the latest in the year 1900 when he first cut the timber, the subject of the controversy in this action, for thus he put it out of his power to turn the land back to the Railroad Company in the condition it was in at the time of the passage of the Act of July 1, 1898. We quote further from the Secretary's decision in the Northern Pacific Railroad Company v. Huston, supra, in support of this contention:

> "It is true the individual claimant is entitled to notice of his right to retain or relinquish his claim to the land in dispute. It does not follow, however, that prior to the receipt of such notice he may not by his own act estop himself from exercising his option. An election may be made as well by an act *in pais* as by formal declaration. The Department has recognized this principle by requiring election to be made within a certain time after the notice and treating a failure to act within that time as an election to retain the land. Should the claimant after the passage of the act perform other acts indicating a clear intention to retain the land, he might thereafter be estopped from asserting the contrary. The commission of waste upon the land might be well

> treated as an act of election when it occasions a substantial detriment to the estate. The use or destruction of timber standing upon the land at the time the claimant became entitled to relinquish or retain the land is certainly strong evidence of his intention to exercise the latter right. If not evidence of that, it could be only evidence of unfair dealing, and this the spirit of the act upon which his alternative right depends does not sanction. The failure of the railway company, even if it had the power to do so, to prevent the performance of such acts would not operate to defeat the estoppel arising therefrom. Ignorance of his rights under the statute is equally immaterial. In the opinion of the Department, all persons entitled to an election under the act of July 1, 1898, who after its passage have placed it beyond their power to return the land to the railway company in substantially the same condition as at the date of the act, should be held to have elected to retain it."

It therefore follows from the holding of the Secretary of the Interior that at the very moment Stanley commenced to denude the land of its timber he then and there elected to retain the land, and the subsequent listing by the Secretary and the quitclaiming of the land by the company were mere ministerial acts preparatory to patenting to him the land he had so elected to retain. It will be noted that when Stanley made his application on January 28, 1908, he claimed settlement from the year 1891, and that at the time he cut the timber he

was on the land as a homesteader with the presumed intent at that time of acquiring title to the land from the United States. He therefore was one of the claimants or settlers in contemplation of whose rights the act was passed.

The case of Humbird v. Avery, supra, answers many of the questions confronting us here and its whole reasoning is persuasive of the attitude of the Government in this suit. In that case the company, after the passage of the act of July 1, 1898, and its acceptance thereof attempted to transfer some of the land in dispute. The court said:

> "The contention of the plaintiffs, stated more fully, is in effect that it was competent for the company, notwithstanding its acceptance of the act, to take out of its operation any lands embraced by its terms, by simply selling or contracting to sell them before the delivery to it or to its successor in interest of the lists above mentioned. In other words — for the contention comes to that—the railroad company, so far as the act of 1898 was concerned, could, notwithstanding the acceptance of its provisions and on the day after such acceptance, have sold or contracted to sell its rights, title and interest in and to all the lands embraced by those provisions. This would have left no lands whatever to which the act could apply. Such a result would have left unsettled all the disputes relating to any lands which the company chose, in its own inter-

> est, to sell while the land department was proceeding under the statute. We do not believe that Congress intended that it should be in the power of the railroad company in any such mode to defeat the operation of the act. Congress, manifestly, had reference to the situation as it was when the act of 1898 was passed."

Now, if the Railroad Company could not, after the acceptance of the act, sell the land, it follows with equal force that they could not destroy the value of the land by disposing of the timber thereon. Consequently the Railroad Company could not have cut or allowed to be cut the timber in question, and if they did so, any money received therefor would have to be turned back to the real party in interest.

AN INCHOATE TITLE TO LAND IS SUFFICIENT TO SUPPORT AN ACTION IN TROVER FOR TIMBER CUT THEREFROM.

As an illustration of this principle, we call the court's attention to a case recently decided by the Supreme Court, Knapp v. Alexander Co., 237 U. S. 162. This is an action to recover damages for timber cut and removed from plaintiff's land and converted into lumber by the defendant. The facts in the case are: That on February 20, 1902, Knapp made homestead entry of a certain quarter section of land; on February 26, 1902, he filed a non-saline affidavit; on April 5, 1902, Knapp went upon the land temporarily and forbade the agents of the Alexander Company to cut any timber from the land upon which he had filed. On July 1, 1902, Knapp

established actual residence on the land; on August 5, 1907, Knapp made final proof, and on January 22, 1908, he received patent to his claim. Between March 20 and April 7, 1902, the timber which was the subject matter of this suit was cut and removed from the land embraced in his entry. The court discussed the findings of the lower court in the following words:

> "The Supreme Court (of Wisconsin) held that since at the time of the cutting the plaintiff was not in actual possession of the land, his right of action, as in trespass *quare clausum fregit,* must depend upon constructive possession, to be established by showing a good title; that notwithstanding plaintiff's homestead entry, there was, for timber cutting prior to the time of his actual entry into possession of the land, only a single right of action, and this was for the benefit of the United States as legal owner, to the exclusion of the entryman; and that, consequently, the settlement between defendant and the Government was a complete defense to plaintiff's action. The court seems to have regarded the entryman, prior to the taking of actual possession, as having no more than a color of title, and, while recognizing that the equitable doctrine of relation is applicable also to proceedings at law, held that this had no effect as against the claim of the United States, and when this was satisfied all claim for damages by reason of the timber cutting became extinguished, and the issuance of a patent could not revive it."

The court then goes on to discuss the real interest the homesteader has in the land filed on by him from the time of filing to the time he received patent therefor, and also the effect of the patent when issued when considered in the light of the doctrine of relation.

> "Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman's interest prior to actual possession as being nothing more than a color of title. From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also *an inchoate title,* subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. United States v. Buchanan, 232 U. S. 72, 76, 77; Gauthier v. Morrison, 232 U. S. 452, 460-462; and cases cited.
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> "The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws, it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut

> off intervening claimants. Shepley v. Cowan, 91 U. S. 330, 337, 338; United States v. Anderson, 194 U. S. 394, 398; and other cases cited. In Gibson v. Chouteau, 13 Wall. 92, 100, the court, by Mr. Justice Field, said: 'By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceedings which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had.' "

Peyton v. Desmond, 129 Fed. 1, which is cited in the Knapp v. Alexander Co. case, supra, is another interesting case on this question of the sufficiency of an inchoate title to maintain trover. This case was decided by the Circuit Court of Appeals for the Eighth Circuit, opinion by Judge Vandevanter. The facts in the case are that Desmond made homestead settlement in 1890 for certain tract of land and received patent therefor on May 16, 1898. Certain timber was cut from this land during the years 1893 and 1894. It appears that Desmond and one Judd settled on the land at about the same time, each claiming to be a prior settler. Judd's application being presented first at the Land Office, was allowed, and Desmond's application rejected. A contest ensued between Desmond and Judd, which was decided in favor of Judd. On July 17, 1893, Judd com-

muted his entry and obtained a certificate of title but no patent. A further contest was had between the parties, which resulted in a decision in favor of Desmond. On October 11, 1893, Judd conveyed his interest in the land in question to one Peyton, who, during the contest proceedings, cut the timber from the land. The question arising in this case was: Can the plaintiff maintain trover for timber cut from land embraced in his homestead but the legal title to which is in the United States? Does the plaintiff's title under the patent issued May 16, 1898, upon his homestead entry relate back to a time anterior to the cutting of the timber by the defendants in the winter of 1893 and 1894 and entitle him to maintain this action?

> "From what has been said, it is clear that the defendants are liable to the plaintiff or to the United States for the conversion of the timber, and that their only lawful concern is that they be made to respond only to the rightful claimant. Their liability is as certain as if the cutting had been a wilful trespass, and the measure of the damages for the conversion is the same, whether the right of recovery is in the plaintiff or in the United States. We therefore return to the question whether the plaintiff's title under the patent relates back to a time anterior to the cutting of the timber, and entitles him to recover for its conversion. * * * * * While the doctrine of relation is of equitable origin, it has a well recognized application to proceedings at law. By it is meant that principle by which an act done at

ing and improving said land, and said land from which said timber was so cut and removed as aforesaid has never been cleared, cultivated or improved and was not intended to be cleared, cultivated or improved by the said William N. Stanley.

V.

That in the fall of the year 1901 and in the spring of the year 1902, the said William N. Stanley and George Charlie and Joe Wilmot, well knowing that said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land, hereinabove fully described, 100,000 feet of red fir timber then standing and growing thereon and placed the same in the Lewis River in the State of Washington at what is known as the forks of said river; that upon placing said timber in said river, the said William N. Stanley, George Charlie and Joe Wilmot thereupon formed the same into rafts in said river; that when said logs were so placed in said rafts in said river as aforesaid, they were of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1902, the said William N. Stanley, George Charlie and Joe Wilmot wrongfully and unlawfully sold said timber in the said rafts, as aforesaid, to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in said rafts in the forks of said river to the amount of 100,000 feet of red fir timber.

That in the fall of the year 1902 and in the spring of the year 1903, the said William N. Stanley and R. A. McLary, the latter now deceased, well knowing the said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land 1,000,000 feet of red fir timber then and there standing and growing thereon, and place the same in Lewis river in the state of Washington at what is known as the forks of said river; that upon placing said lumber in said river, said William N. Stanley and R. A. McLary thereupon formed the same into rafts in the said river; that when the said lumber was so placed in said rafts in said river as aforesad it was of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1903, the said William N. Stanley and R. A. McLary wrongfuly and unlawfully sold the said lumber in the said rafts to the said defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in the said rafts at the forks of said Lewis River to the amount of one million feet of red fir timber.

That the said timber so cut, removed and sold as aforesaid, by the said William N. Stanley, George Charlie, Joe Wilmot and R. A. McLary, aforesaid, at and during the time aforesaid, was so cut, removed and sold without the knowledge, consent or permission of the said Northern Pacific Railroad Company, or its successors or assigns in interest, and without the knowledge, consent or permission of the United States of America.

perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated. The defendants made that impossible. When the patent was issued, the timber was gone. In its stead there existed a right of action for its conversion. Does not the promotion of justice—the due protection of the plaintiff's rights—require that his patent be held to relate to the date of his initiatory act, and thereby invest him with that which now takes the place of the timber? We think it does. * * * It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of the homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the Government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the sever-

ance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action."

We earnestly contend to the court that in view of the construction given by the Supreme Court to the Act of July 1, 1898, Humbird v. Avery, supra, the appellant here, at the time of the cutting of the timber from the land in question by Stanley, had such an inchoate title as would enable it now to maintain an action in trover for the value of the timber cut.

The Knapp v. Alexander Co. case, supra, directly supports our contention. In that case the plaintiff at the time the timber was cut had no title to the land upon which the timber grew, nor was he then in possession. At that time he had only filed his homestead entry, to which he obtained patent long afterwards. Yet the court held that the title given him by his patent related back to the inception of his entry, and at the time of the cutting of the timber he had an inchoate title which would enable him to maintain his action for the value of the timber, even though he was not in possession at the time of the cutting. The initial entry made by him gave him an absolute right under the law to obtain a patent provided he conformed to the requirements of the law with respect to residence and cultivation.

In the case at bar the Act of July 1, 1898, accepted by the Railroad Company, was in effect an agreement between the Railroad Company and the United States, made to settle previous disputes between settlers under Federal laws and the Railroad Company, both claiming

title to various lands included within the railroad limits under the grant of 1864. By this agreement the railroad absolutely bound itself to surrender the lands listed for relinquishment by the Secretary of the Interior. It had no right to dispose of any of these lands pending the action of the Secretary in carrying out the terms of the Act of 1898, and therefore could not dispose of the timber on the lands or exercise acts of ownership thereover. The Act really settled the disputes between the settlers and the railroad company as they existed on January 1, 1898. The rights of the disputing parties were settled and adjusted as of that date. The Secretary's duty then, in listing the lands for relinquishment, was not to adjust or declare any new rights of claimants under the United States arising since the passage of the Act; but the listing by him of the lands for relinquishment, the relinquishment thereof by the railroad company, their making of a quitclaim deed and the acceptance thereof by the Government, were merely steps toward the completion of a title provided for, settled and agreed upon by the Act of July 1, 1898, itself, as of date January 1, 1898. It must necessarily follow then, that the United States held an inchoate title, for the benefits of the settlers, from the date of the Act until title was perfected to those lands which were to be relinguished by the railroad company under the terms of the Act. By application of the doctrine of relation, as in the Knapp v. Alexander case, the title of the Government to the land relinquished would relate back to the date of the initiatory adjustment of the respective rights of the railroad company and settlers holding under the

United States, that is, July 1, 1898. We think the conclusion is irresistible, from the very wording of the act itself, that it was the intention of Congress that title when obtained by the Government should relate back to the date of the Act, and that the right of the Government to such title had its inception from such date.

As alleged in the complaint, at the time of the cutting of the timber from the land in question by Stanley, he was occupying the land as an actual bona fide settler under the United States and was claiming, as is shown by his subsequent filing, as such settler by virtue of residence and settlement from the year 1891. We contend that the facts alleged in the complaint sufficiently show that the land in question in this action was a part of the lands which the railroad company had agreed to relinquish by virtue of their acceptance of the Act of 1898, and, therefore, the United States had an inchoate title to the land at the time of the cutting and conversion of the timber thereon. Having such inchoate title the United States could recover from Stanley, the trespasser, or from the appellee herein who purchased the timber from him.

Knapp v. Alexander Co. (supra).
Woodenware Co. v. U. S. (supra).

Counsel for appellee in the lower court placed great reliance upon the case of U. S. v. Loughry, 172 U. S. 206 as supporting their contention that the appellant has no cause of action, and it is presumed that they will rely strongly upon that case here. This was an action in trover for the recovery of damages for certain timber

cut by the defendant. The timber was cut from land granted by the United States to the State of Michigan to aid in the construction of a railroad. By the provisions of the grant if the railroad was not built the unsold lands were to revert to the United States. The railroad was not built at all. The grant was construed by the court to be a grant in praesenti with a condition subsequent. A forfeiture of the grant was declared by Congress but not until subsequent to the cutting of the timber in question. The court held that to entitle the plaintiff to recover in the action, which was substantially in trover, it was necessary to show a general or special property in the timber cut and a right of possession of the same at the time of the commencement of the suit. We quote from the decision at page 211:

> "It follows that the United States, having no title to the lands at the time of the trespass and no right to the possession of the timber, are in no position to maintain this suit."

And further, at page 219, the Court says:

> "They (the Government) had no right to the possession of the land until Congress passed the Act of March 2, 1889, forfeiting the grant. Up to that time the title was in the state, and until then the United States had no more right to enter and take possession than they would have to take possession of the property of a private individual."

This case is clearly distinguishable from the one at bar where at the time of the trespass the railroad company was not in possession, but the land was occupied by Stanley as a bona fide settler under the United States land laws with the presumed intention of obtaining the title from the United States, and the railroad company, prior to the trespass, by its consent to the Act of July 1, 1898, had confirmed the validity of Stanley's possession under the Government and his rights to obtain title from the Government.

The court in the Loughry case, above cited at pages 218 and 219, discussed several cases wherein the doctrine of relation was applied relating title back to its inception, so as to enable the plaintiff to recover in trover for timber severed from lands to which title was obtained subsequent to trespass. Commenting on these cases, the Court said:

> "These cases are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the lands—a title which no one could disturb, and which the state was bound to perfect by the issue of a patent, provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended."

We submit that this part of the Court's opinion clearly shows that the Loughry case is not applicable in principle to the facts in the case at bar, which plainly comes within the distinction made. At the time of the trespass in the case here the United States had an inchoate title to

the land trespassed upon, which the railroad company could not disturb, and which the said company was bound to perfect by relinquishment and deed, provided the United States followed up its rights under the Act of 1898 and listed the land for relinquishment.

We take it as fundamental that where there is a wrong there is a remedy, that procedure is not an end in itself, but only the means to an end, that is, the administration of justice according to law. According to the allegations of the complaint this timber was cut wrongfully by Stanley and others, they having no title to it, and sold to the appellee herein. This wrong should not be without redress. Some one is entitled to recover the value of this timber. The United States and the railroad company were the only parties in interest. The railroad company, although it held the legal title to the land at the time of the trespass, was not damaged, for it, upon relinquishment of the land, received other land in lieu thereof. Even before it did relinquish it could not have recovered from Stanley for the trespass because he was holding under the United States and was one of the settlers whose rights were adjusted by the Act of 1898. The railroad company upon relinquishing the land was of course bound to return it to the Government intact without a large portion of its value, the timber, denuded from it. Even if the company could have recovered for the trespass it would be accountable to the United States for the amount so had and received. The United States having taken back the land from the railroad company, by virtue of the Act of 1898, minus the timber thereon, a considerable portion of its value, is the real

party suffering the damage. The doctrine of relations is a fiction of law adopted solely for the purposes of justice, and by it one who equitably should be so entitled is enabled to assert a remedy for an injury suffered which otherwise should go unredressed. Gibson v. Chouteau, 13 Wall. 92, at 100. The case at bar, we think, clearly calls for the application of the doctrine of relation, as above urged, to redress the wrong suffered by this appellant.

Upon the whole record, it is respectfully submitted that the judgment of the district court should be reversed with direction to overrule the demurrer to the amended complaint.

Respectfully submitted,

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